

John Dormer of Ascot, Esq; Appellant.

The Hon^{able} Charles Bertie and Henry Bertie, Esq^{rs},
The Children of the Hon^{able} Peregrine Bertie, Esq;
deceas'd,
And the Children of Henry Cane, Sen' Gent. deceas'd, } Respondents.

The Respondents C A S E.

Will 10 Novemb. 1693.

The very Words.

Testator died 1 Feb. 93.

24 Jan. 1697.

The Appellant was but
Cousin-German to the
Testator.

6 Feb. 1698.

9 Feb. 1698.

13 March 1698.

Lord Somers,
14 June, 1699.

Vide, Act against
Fraud, &c. in 1677.

Robert Dormer, Esq; (deceas'd) being seized in Fee of a real Estate of near 1700 l. per Annum; and, having contracted Debts to the amount of 8000 l. beyond the Value of his personal Estate, made his Will, and thereby devised out of the said real Estate 200 l. per Annum apiece in Fee to his six Brothers of the Half-Blood (the Dormers of Rowsham) to be settled on them by his Executors at the end of three Years next after his Death. And gave to each of his Executors Legacies of 5 l. apiece to buy them Rings and the like Legacy to the Appellant. Willed, That all his Debts should be paid by his Executors: "And then gave all the rest and residue due of his real and personal Estate to his three Uncles, Peregrine, Charles and Henry Bertie, and Henry Cane, Sen' (whom he appointed Executors of his Will, in Trust and Confidence that they would see it performed) equally to be divided between them, Share and Share alike: To have and to hold the same to them, their Heirs and Assigns for ever, or to the Survivors of them, who should take the Care and Trouble upon them to see the Will performed.

These four Executors (now Respondents) proved the Will and took upon them the Payment of the Debts. The Appellant brought his Bill in Chancery for recovery of the whole Estate, suggesting, That the Will was obtained by fraud and when the Testator was not compos mentis; and in other Parts of his Bill he seemed only to aim at the said Surplus, on pretence, that 'twas devised in trust for him, and ought to enure to his Benefit as Heir at Law.

The Appellant might and ought to have gone to Hearing upon the Construction of the Will without any Examination; but, instead thereof, he took out a Commission, and examined many Witnesses upon pretence of setting aside the Will, which necessitated the Respondents to examine on their part to support the Will: And it was fully made appear, That the Testator had a great Respect and Value for his said Executors, (three of whom were his own Uncles) and that the Appellant had quite lost his Favour.

The Appellant, after the Commission executed, moved and got leave to add an Interrogatory, to examine one Smith and Mason, as to Mr. Cane's Discourses touching the Will, and afterwards (without giving due Notice) moved, and by surprize, obtained an Order of 6 Feb. 1698. for enlarging the Interrogatory so as to extend it to the Testator's Discourses, and to re-examine Smith thereto; which last Order was three Days afterwards discharg'd upon long Debate, the Court being satisfied that no such Examination or Enquiry ought to be permitted in relation to a Will in Writing, and that Smith had been before examined at the Commission to that very Matter.

On Hearing the Cause, the Appellant insisting that the Will was not good, the Court directed the Validity thereof to be tried at Law, and that Mr. Cane, Sen', who drew the same, should be examined on Interrogatories, for discovery of the Draught and Instructions.

Mr. Cane was examined accordingly: After which the Appellant would not proceed to Tryal, but waved the same, and admitted the Will to be good, and 14 June, 1699, brought on the Cause to be Heard as to the pretended Trust: Whereupon, and upon Reading the Will and Proofs and long Debate, the Court declared they saw no Cause to give the Appellant any Relief, and therefore Dismissed his Bill: From which Dismission, and also from the said Order of 6 Feb. Mr. Dormer the Heir has Appealed, and prays he may have the Benefit of the said Surplus claimed by the Respondents.

But the Respondents are advised, and do insist that the said Dismission is just and equitable; for that the said Will is so far from Importing or Implying any Trust for the Appellant, as to any of the Lands thereby devised, that there can hardly be found Words that do more expressly exclude any such Trust, Presumption or Implication as the Appellant aims at. And the said Order of the 6 Feb. was justly Discharged, for that it is not Consonant to the Laws and Statutes of this Realm, that any Examination or Parol-proof should be admitted to alter the Construction of a written Will concerning Lands, and for that it is against Practice, and would be of dangerous Consequence to all Mens Estates, and a means to introduce Perjury, if Witnesses who have been once examined in a Cause, should afterwards be permitted to be re-examined to the same Matters.

Wherefore the Respondents pray the said Appeal may be Dismissed with Costs.

HENRY POLEY.